

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

- - - - -
United States of America,)
Plaintiff,)
vs.) FILE NO. 3:09-cr-155-01
Ferris Lavelle Lee, a/k/a Vito,)
Defendant.)
- - - - -

T R A N S C R I P T
O F
P R O C E E D I N G S
SENTENCING - AUGUST 30, 2010
Pages 1-46

TAKEN AT: QUENTIN BURDICK UNITED STATES COURTHOUSE
655 FIRST AVENUE NORTH
FARGO, NORTH DAKOTA 58102

BEFORE: THE HONORABLE RALPH R. ERICKSON

COURT REPORTER: KELLY A. KROKE

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P R O C E E D I N G S

(August 30, 2010: The following proceedings commenced at 11:00 a.m.):

THE COURT: We'll go on the record in a case entitled United States of America versus Ferris Lavelle Lee. It's file No. 3:09-cr-155. The record should reflect that the defendant appears personally along with his counsel, Mr. Goff. Mr. Myers appears on behalf of the United States.

This case was tried to a jury trial and on May 28, 2010 the defendant was found guilty of Count One, conspiracy to possess with intent to distribute and distribute a controlled substance, in violation of 21, United States Code, 841(b)(1)(A), and 18, United States Code, Section 2. That carries a maximum term of imprisonment of life. It carries a mandatory minimum sentence of life. There is a maximum allowable \$8 million fine, supervised release of at least 10 years and a \$100 special assessment.

Counts Two through Twelve charge the defendant with distribution of a controlled substance, in violation of 21, United States Code, Section 841(b)(1)(C) and 18, United States Code, Section 2. They carry a maximum term of imprisonment of 30 years. There is no mandatory minimum, a maximum allowable fine

1 of \$2 million, six years of supervised release and a
2 special assessment of \$100.

3 Then on Count Fourteen the defendant was
4 convicted of a charge of continuing criminal enterprise,
5 in violation of 21, United States Code, 848(a)(1)(H) and
6 (C). This is a Class A felony. It carries a maximum
7 term of imprisonment of life. There is a minimum
8 mandatory 30-year sentence that is required in this
9 case. There's a maximum allowable fine of \$4 million,
10 supervised release of five years and a \$100 special
11 assessment. Basically if you look at the sentence then
12 the defendant faces a maximum total of two life
13 sentences plus ten 30-year sentences. So two life
14 sentences plus 300 years, special assessments of up to
15 \$1,200 and a period of supervision up to life.

16 Now there is one complicating factor. The
17 defendant's been convicted on both Count One and Count
18 Fourteen, and one of those counts must be vacated at the
19 time of sentencing and that's because in Rutledge v.
20 United States the United States Supreme Court held that
21 a continuing criminal enterprise conviction under 848
22 necessarily includes a conspiracy charge under 846 and,
23 therefore, only one punishment may be imposed.

24 In Ball v. United States the Court -- which
25 is a U. S. Supreme Court case from 1985 as well. The

1 remedy for that is vacation of one of the sentences.
2 That, of course, leaves it open to the judge or to the
3 discretion of the Court. Eighth Circuit law is somewhat
4 ambivalent. On a couple of occasions the Court has sent
5 back, with instruction, a direction that one of the
6 convictions be vacated. I point to United States v.
7 Johnson, which is at 495 F.3d 951 at page 981, and
8 United States v. Possick, which is at 849 F.2d 332.
9 United States v. Jefferson was sent back with direction
10 that the conspiracy count be dismissed because it's a
11 lesser included and it must be vacated on double
12 jeopardy grounds. That's at 215 F.3d, page 823.

13 Other circuits, when they've looked at it,
14 have basically said that the rule of lenity is
15 inapplicable and that, therefore, the Constitution
16 requires the vacation of the underlying conspiracy
17 charge. I would point to United States v. Brito, which
18 is at 136 F.3d 397 at page 408, and United States --
19 that's a Fifth Circuit case, and United States v.
20 Decarlo, which is at 434 F.3d 447, which is a 2006 Sixth
21 Circuit case. And then the Eleventh Circuit also
22 requires the vacation of the lesser included offense.
23 That's United States v. Boyd at 131 F.3d 951.

24 Other Courts, in applying Rutledge, have
25 said it's up to the Court to make their own

1 determination. There's a Second Circuit opinion that's
2 found at 8 Federal Appendix 109 and a Seventh Circuit
3 case at 220 F.3d 833. And, like I said, the Eighth
4 Circuit law is somewhat ambivalent in that we have two
5 cases that said that they should be remanded for the
6 Court to determine and one that directed the Court to
7 dismiss the lesser included offense. And so I think all
8 of that leads to this particular discussion.

9 The sentence range on Count Fourteen is 360
10 months to life, with the lesser included offense
11 carrying a mandatory minimum life sentence. And the
12 co-defendant, who's been convicted of only the
13 conspiracy charge, faces a mandatory minimum life
14 sentence. And so we are in sort of a rather unusual
15 circumstance that if the Court follows what would
16 ordinarily be what appears to be the majority position,
17 which is you dismiss the lesser included offense, you'll
18 dismiss the mandatory life sentence and then be left
19 with a sentence guideline range on Fourteen of 360 to
20 life.

21 And basically I lay all this out because I
22 think that ultimately I think that's an issue that the
23 parties should address in their arguments when we get to
24 the question of sentencing.

25 Do you understand what I've laid out and

1 why, Mr. Myers?

2 MR. MYERS: Yes, Your Honor.

3 THE COURT: Mr. Goff?

4 MR. GOFF: Yes, Your Honor.

5 THE COURT: All right. Okay. Now a
6 Presentence Investigation Report has been prepared.
7 It's been lodged with the Court. I've had an
8 opportunity to review it.

9 Does the United States have any objections
10 or corrections to it?

11 MR. MYERS: We don't, Your Honor. And as it
12 relates to the written objections of Mr. Lee through the
13 letter of Mr. Goff, I think that's adequately covered
14 each of those paragraphs, either through Mr. Roerich's
15 response and most of which is referenced to the record
16 at trial.

17 THE COURT: All right. Mr. Goff, as the
18 objections were raised, there were a number of changes
19 that were made then to the Presentence Investigative
20 Report and there were a number where basically what
21 happened was the investigating officer noted the
22 objection's been raised, set forth the position why he
23 thinks what he put there was correct and then
24 recommended no change.

25 And at the end of the day I don't know that

1 any of them really have any bearing at all on how the
2 Court will look at the sentencing factors and their
3 applicability in this case, but if you -- do you wish to
4 make any further objection that you have not raised?

5 MR. GOFF: Your Honor, I believe that in my
6 correspondence to the probation officer who prepared the
7 Presentence Investigation, I raised the objections that
8 my client and I discussed personally when we went over
9 the Presentence Investigation. I do know that in
10 visiting with my client today that he indicates that I
11 did not represent all of the objections that he had at
12 that time and that he has additional objections that he
13 intends to raise today.

14 I don't know the details of those at this
15 time, but I do believe that I raised the objections that
16 we discussed when we met and went over the Presentence
17 Investigation and I acknowledge the responses of the
18 presentence investigator.

19 THE COURT: All right. Mr. Lee, what
20 objections do you wish to raise that have not been
21 raised?

22 THE DEFENDANT: When he came and seen me
23 when I was reading the whole government's story, I told
24 him that I object to the whole thing so just all of it.
25 I mean, if you want me to go one by one give me the

1 paper. I object to them. If you want me to read them
2 off, the whole government's --

3 THE REPORTER: Can you move the mic closer,
4 please, Mr. Lee?

5 THE DEFENDANT: I said the whole
6 government's --

7 MR. ROERICH: Your Honor, I hate to
8 interrupt but I can't hear a word he's saying.

9 THE COURT: Yeah, we'll move the microphone
10 closer. All right. Now you object to the whole thing.
11 You mean, the entire presentence report?

12 THE DEFENDANT: About, yeah, the
13 government's story, whatever it is. Yeah, the offense
14 conduct, whatever it is.

15 THE COURT: All right. And you object to
16 the offense conduct. What page and what paragraphs in
17 specific? You know, you're starting on page seven with
18 paragraph 26.

19 MR. GOFF: He's on that page now, Your
20 Honor.

21 THE COURT: All right. And so basically
22 you're saying that paragraphs 26 through 54, which is
23 the offense conduct, you object to all of it?

24 THE DEFENDANT: Yup.

25 THE COURT: Okay. Anything else you want to

1 tell me about what you object in that and why?

2 THE DEFENDANT: I had -- when I went over it
3 with my lawyer it's like -- let me see.

4 MR. GOFF: If I might just interject, Your
5 Honor, while he's looking we did go over the entire
6 Presentence Investigation page by page, paragraph by
7 paragraph, line by line. And my intent was to represent
8 in the correspondence that I sent to the presentence
9 investigator the objections that he and I discussed and
10 that he had to the facts. If there are additional ones
11 I'm not aware of those, but I did try to represent those
12 as we went through this line by line at that time.

13 THE DEFENDANT: His whole thing that he told
14 me was he told me that this is just the government's
15 story and, you know, what happened in trial. So he
16 didn't write down every objection that I had to each one
17 of these paragraphs because as we went along I kept on
18 objecting, objecting, objecting. And he's like: Well,
19 it's just the government's story and the judge knows
20 what evidence was proven in trial.

21 But I'm saying it says that I'm a part of a
22 Mickey Cobras street gang. Lionel Fraction is
23 supposedly who I worked for. There's a lot of stuff,
24 man. Let me see.

25 THE COURT: All right. Let's just do this.

1 I've had a chance to review the responses of the
2 probation officer, the changes that have been made. I
3 find that those changes that were made were appropriate.

4 Now as far as the offense conduct is
5 concerned, I'm giving no weight to any claim that the
6 defendant as a member of a criminal street gang. I am
7 giving no weight to what Lionel Fraction's role was, if
8 any, because it doesn't really matter to how I see the
9 case. The fact is that the evidence that I have
10 considered and will consider in the course of trying the
11 case is the evidence that was presented at trial that
12 was subject to the cross-examination of the parties. It
13 strikes me that that's the evidence that's important to
14 this case. And that in addition to that I will consider
15 the defendant's criminal history.

16 But as far as the offense conduct, who said
17 what, when they said it, just -- it's not that important
18 to me. I mean, I think the bottom line here is the
19 evidence that was presented in trial which led to the
20 conviction and that's -- I mean, that's really the
21 evidence that's before the Court.

22 So your objection's been noted for the
23 record, okay? Anything else?

24 THE DEFENDANT: I want to know -- you
25 said -- what did you say about the fatal variance?

1 MR. GOFF: He's referring now to your order
2 denying the motions, Your Honor. He's been moved
3 recently to Crookston so we met about that personally
4 today and I showed him a copy through the glass. I just
5 handed him a copy here at the beginning of the hearing
6 today. I think that's what he's referring to now rather
7 than the PSI.

8 THE COURT: I denied the motions. I believe
9 that there is sufficient evidence in the record to
10 sustain the convictions.

11 THE DEFENDANT: Right. So, I mean, when we
12 was going through trial you said: I will tell you that
13 it is a fatal variance in the drug amount. Now you
14 ruled against it or what?

15 THE COURT: I don't understand what you're
16 saying.

17 THE DEFENDANT: You said there was a fatal
18 variance in the amount of drugs, the weight of the drugs
19 in the Indictment, right, when we was going through
20 trial?

21 THE COURT: No, I never said there was a
22 fatal variance, did I? That's not my recollection.

23 THE DEFENDANT: Yeah, when Marcus Royston
24 brought it up. You don't remember?

25 THE COURT: Okay. If you read what Marcus

1 Royston's argument was, was that there was a fatal
2 variance in the drug quantities. And there is not a
3 fatal variance in the drug quantities as the whole of
4 the conspiracy is concerned. I don't understand what
5 you're getting at. Do you want to tell me exactly --
6 where do you see the fatal variance? Where's the proof
7 problem specifically?

8 THE DEFENDANT: I don't have my exact papers
9 here right now, but I don't have them papers with me
10 right now.

11 THE COURT: I think the evidence is
12 sufficient to sustain the verdicts and I think the
13 evidence is sufficient under the Indictment. That's
14 what my order said, and I believe that's what the proof
15 will sustain.

16 THE DEFENDANT: Right, okay. Well, can you
17 explain this to me, okay? I was found guilty of 500
18 grams, right?

19 THE COURT: Right.

20 THE DEFENDANT: Okay. Due to the minor's
21 story, Marcus Royston was my supplier, right?

22 THE COURT: There were in the evidence
23 different routes of supply.

24 THE DEFENDANT: It was only one supplier
25 that was talked about during trial. Jake Northern said

1 he didn't get no drugs from Chicago. He said Marcus
2 Royston put a bowl up on the screen and Marcus Royston
3 was my supplier. How am I found guilty of 500 grams but
4 not my supplier?

5 THE COURT: There were other avenues into
6 that conspiracy in the evidence. I mean, that's the
7 problem.

8 THE DEFENDANT: I'm saying --

9 THE COURT: The trips to Chicago.

10 THE DEFENDANT: Right. That Jake Northern
11 got on the stand hisself and say he never got any drugs
12 from Chicago.

13 THE COURT: Mr. Myers, do you wish to
14 address that?

15 MR. MYERS: Judge, I think the Court's
16 analysis is correct. There were various trips to
17 Chicago and Minneapolis. For a time Marcus Royston was
18 a source of supply for the powder cocaine by way of
19 Minneapolis for this organization. So I think the Court
20 correctly sizes up this conspiracy.

21 THE COURT: The other thing that's important
22 to note when you look at -- one never creates a variance
23 by looking at the convictions of another defendant, and
24 there's case law that says that a person may be found
25 not guilty or a factual finding not made because the

1 jury may be motivated by -- may be motivated by mercy.
2 And at the end of the day one examines the evidence of
3 each individual defendant on each individual charge to
4 see if it's sufficient, all right? Because we don't
5 know whose ox is gored, okay? And that's the -- that's
6 just the legal analysis.

7 THE DEFENDANT: Right, okay. But the trip
8 that Herb said supposedly went to Chicago and got drugs,
9 Jake Northern said it never happened. That was the only
10 trip to Chicago that was mentioned to get drugs. The
11 only other drugs that was mentioned that Jake Northern
12 testified came from Marcus Royston. So I don't
13 understand. Like, how does that go?

14 THE COURT: Here's really the deal. I went
15 through the evidence. I reviewed it. I looked at the
16 transcript. I reviewed what I had. I am convinced that
17 the evidence is sufficient to sustain the convictions.
18 Now you got a problem with that? You take that up with
19 the Court of Appeals, okay? You raised it. I ruled.

20 THE DEFENDANT: Mm-hmm.

21 THE COURT: Okay? Anything else you want to
22 talk about?

23 (Defendant shakes head.)

24 MR. GOFF: Your Honor, I know that my client
25 wishes to address the Court as to sentencing. I don't

1 know if there are any other issues that will be
2 appropriate before sentencing. I'm not sure. He's
3 asking me, Your Honor, about post-conviction proceedings
4 and I've explained to him that would be later.

5 THE COURT: The base level of the offense --
6 first of all, I'll receive the Presentence Investigation
7 Report. I believe I've ruled on all of the objections
8 to it. The base level of the offense under sentencing
9 guideline 2D1.1 is 34. That's based on at least 500
10 grams but less than 1.5 kilograms. There's a four-level
11 upward adjustment under 3B1.1(a) because the defendant
12 was an organizer or leader of a criminal activity that
13 involved five or more participants or was otherwise
14 extensive. There's a two-level upward adjustment under
15 3B1.4 because the defendant used a person under the age
16 of 18 to assist in the offense or to avoid apprehension
17 for the offense. That would yield an adjusted offense
18 level of 40.

19 On Count Two the base level of the offense
20 under 2D1.1 is 12. There's a plus four for an
21 aggravating role adjustment under 3B1.1 for a total
22 adjusted offense level of 16.

23 On Count Three the base level of the offense
24 under 2D1.1 is 16. There's a plus four under 3B1.1(a)
25 for the leadership role in the offense. That would

1 yield an adjusted offense level on Count Three of 20.

2 On Count Four the base level of the offense
3 under 2D1.1(c)(14) is 12, plus four under 3B1.1 for role
4 in the offense for an adjusted offense level of 16.

5 Count Five, the base level of the offense
6 under 2D1.1(c)(12) is 16. There is a plus four under
7 3B1.1(a) for role in the offense for an adjusted offense
8 level of 20.

9 Count Six, distribution of a controlled
10 substance, the base level of the offense is -- under
11 2D1.1 is 16. There's plus four under 3B1.1(a) for the
12 role in the offenses for an adjusted offense level of
13 20.

14 Count Seven, under 2D1.1 the base level of
15 the offense is 12. There is a plus four under 3B1.1(a)
16 for role in the offense for an adjusted offense level of
17 16.

18 Count Eight, the base level of the offense
19 under 2D1.1(c)(13) is 14, plus four for the role in the
20 offense under 3B1.1(a) for a total of 18.

21 Count Nine, distribution of a controlled
22 substance, under 2D1.1 the base level of the offense is
23 a 12. Then there's a plus four upward adjustment for
24 role in the offense under 3B1.1 for an adjusted offense
25 level of 16.

1 Count Ten, distribution of a controlled
2 substance, the base level under 2D1.1 is 18. There is a
3 plus four under 3B1.1 for role in the offense for an
4 adjusted offense level of 22.

5 Count Eleven, the base level of the offense
6 is 16 under 2D1.1(c)(12). There is a plus four under
7 3B1.1(a) for role in the offense for an adjusted offense
8 level of 20.

9 Count Twelve, the base level of the offense
10 is a 14 under 2D1.1(c)(13). There's plus four under
11 3B1.1(a) for role in the offense. This should yield an
12 adjusted offense level of 18.

13 Count Fourteen, which is the continuing
14 criminal enterprise conviction, under 2D1.5(a)(2) the
15 base level is 38. There are no adjustments to that and
16 so it would yield an adjusted offense level of 38.

17 The combined offense level, you look at
18 Counts One through Twelve and Fourteen, they're all
19 closely related counts under 3D1.2(d) and under 3D1.3(b)
20 they should be grouped. Group one has the highest
21 offense total in Count One which has an adjusted offense
22 level of 40. The defendant is a career offender under
23 4B1.1 as well. His criminal history score is a total of
24 seven. Pursuant to 4A1.1(d), two points are added if
25 the defendant committed any part of the offense while

1 under a criminal justice sentence, including probation.

2 In this case the defendant was still under a
3 criminal justice sentence in the following cases during
4 the time frame that he was committing the instant
5 offense: One, Clay County District Court file No.
6 14-K5-04-001798; Burleigh County District Court file
7 No. 08-K-2699 and Minnehaha County Circuit Court
8 No. 49C03003613. In addition, there would be two
9 additional points added to the instant offense following
10 release from confinement less than two years under
11 4A1.1(b). However, if two points are added under
12 4A1.1(d) then only one point may be added under
13 4A1.1(e). According to Table 5, part A10, the criminal
14 history points would establish a Criminal History
15 Category of V.

16 The recency point -- however, even if the
17 provisions under 4B1.1 career offender subsection (b)
18 have been met, the Criminal History Category in every
19 case shall be Criminal History Category VI and the
20 defendant does meet the criteria. So he's in Criminal
21 History Category VI.

22 Now if you're in Criminal History
23 Category -- level 40, Criminal History Category VI, it
24 would be 360 to life. If the Court vacates Count One as
25 a lesser included offense, then the defendant would be

1 sentenced at a level 38 in Criminal History Category VI,
2 which would also yield a sentencing guideline range of
3 360 months to life. The mandatory minimum sentence on
4 Count One is life and so the sentencing guideline range
5 would be life if the Court does not vacate Count One.
6 The sentencing guideline range, if the Court were to
7 vacate Count One, would be 360 months to life, which is
8 all as clear as mud. But, as we sit here right now at
9 this moment, the sentencing guideline range is life
10 because right now the defendant's been convicted on both
11 Count One and Count Fourteen.

12 Any objection to the guideline calculation,
13 Mr. Myers?

14 MR. MYERS: No, in essence I don't, Judge.
15 A couple things. One on the minimum mandatory, I note
16 that pretrial services found that the racketeering
17 conviction in Clay County would be a prior offense under
18 848, that section. I don't necessarily agree and I
19 can't stand here and let this proceed without noting
20 this for the Court. I don't think, under that section,
21 that's a prior conviction. Racketeering is a similar
22 offense but the way 848 reads it indicates that it needs
23 to be a prior conviction under this section, and the
24 only way you can read that is a prior conviction under
25 the CCE statute. Otherwise, we could certify any prior

1 felony conviction under 848, which we can't do.

2 And so I think, Judge, on Count Fourteen the
3 minimum mandatory is 20 with a guideline range of 360 to
4 life as the Court noted.

5 THE COURT: On Count Fourteen it's 20 with
6 360 to life.

7 MR. MYERS: Correct.

8 THE COURT: All right.

9 MR. MYERS: And the only other thing is I
10 believe that if the Court vacates the conspiracy count I
11 still believe that the use of the juvenile can be
12 attributed to the CCE count because it's a distinct
13 enhancement for two levels. So I think it's 40. Again
14 it doesn't change the guideline analysis but if the
15 Court vacates that it's going to be a 40 instead of a
16 38. Again it doesn't change. That's all I had to note
17 for the record on those issues.

18 THE COURT: Use of minor under 40 would in
19 fact be a two-level adjustment upward.

20 MR. MYERS: And typically --

21 THE COURT: Typically we don't worry about
22 it because it's not part of the deal, and we've got a
23 mandatory life sentence in both counts. Usually we get
24 to the quantity on the CCE charge.

25 MR. MYERS: Right. And usually you don't --

1 THE COURT: You've got --

2 MR. MYERS: You know, you'll have the two to
3 four levels enhancement. Under CCE you don't count
4 those because they're already incorporated. This is
5 different I believe. The juvenile should be counted if
6 the Court vacates it. Again it's a theoretical
7 difference.

8 THE COURT: Mr. Goff?

9 MR. GOFF: Your Honor, as I understand that
10 last discussion, it's a theoretical difference because
11 the guideline range on the CCE count is still 360 to
12 life.

13 THE COURT: It's going to be 360 to life no
14 matter what. And the question really is: Is it a base
15 offense level 40 or is it a base offense level 38? And
16 the range doesn't matter. The minimum mandatory is
17 less. It's 20 years and I think the government's
18 analysis is right on that. And so I think the minimum
19 mandatory on Count Fourteen is 20 years, not 30 years,
20 and that the 30 years to life is the guideline range.

21 MR. GOFF: With that conclusion, Your Honor,
22 I agree with that analysis.

23 THE COURT: All right. So I think what
24 we've got here is that the sentencing guideline range is
25 life on Count One and 360 to life on Count Fourteen and

1 that without any of the sentences being vacated under
2 the grouping we'd then be looking at the guideline range
3 being life. And the issue will become -- we're going to
4 have to vacate either Count One or Count Fourteen and
5 the question becomes which one?

6 All right. Mr. Myers, I think whatever
7 objections there are to the guideline calculations have
8 been addressed. At this point does the United States
9 have a sentence recommendation?

10 MR. MYERS: We do, Your Honor. First to
11 start out, Judge, I want to address the Court's
12 questions on which count to sentence the defendant on,
13 either Count One or Count Fourteen. We, as the Court
14 noted, had difficulty finding really good case law on
15 this particular issue and we would fall back on the
16 principle of the Court should sentence this defendant on
17 the most serious offense that was charged, that being
18 the CCE count even though the conspiracy count carries a
19 greater penalty. So that would -- we would ask the
20 Court to sentence the defendant on the CCE count.

21 That being said, the case law Rutledge I
22 think itself indicates that should the defendant be
23 successful on appeal on the CCE count the Court of
24 Appeals could vacate that count and reinstitute the
25 CCE -- or the conspiracy count and the sentence that

1 accompanies that particular offense.

2 In looking at our sentencing recommendation
3 here today, Judge, I want to highlight some of the
4 3553(a) factors that the Court has available to it in
5 fashioning a sentence for this particular defendant.

6 First, the serious nature of the offense.
7 Who we have here today is a leader of a continuing
8 criminal enterprise. This again is the most serious
9 drug offense that can be charged under federal law. The
10 conduct of this defendant in leading this particular
11 enterprise was arguably the largest and most
12 sophisticated crack cocaine distribution system that
13 we've seen, at least in my tenure here in this office.

14 As part of the enterprise, hundreds if not
15 thousands of offenses were committed in the distribution
16 of these rocks of crack cocaine. As the Court saw at
17 the trial, this drug was devastating to the users, each
18 rock affecting and changing the life of many people as
19 it affected the user. It was a fairly sophisticated
20 enterprise over multiple states. Ferris Lee would drop
21 in a distributor in Sioux Falls or drop in one in Fargo
22 or drop one in particularly in Bismarck where they
23 dropped in a distributor that had issues, pulled him
24 out. Dropped in another one, pulled him out. Dropped
25 in another one, all of which was designed simply to

1 insulate Ferris Lee and the upper echelon of this
2 organization from law enforcement detectives.

3 Coupled with that sophistication, you have
4 the use of a juvenile in distributing controlled
5 substances. And undoubtedly Mr. Goff will talk about
6 the count he was acquitted on but the jury found beyond
7 a reasonable doubt that Lloyd Johnson was used as part
8 of this particular enterprise. The evidence bore that
9 out. Mr. Johnson was a significant marijuana and crack
10 cocaine distributor for the organization.

11 Ferris Lee's method of operation could be
12 best described as simply using people to make money for
13 himself. He used people at every turn. Tambi Bishop,
14 used her place, used her in exchange for crack cocaine.
15 His girlfriend, Shaina Sjostrand, again used her. James
16 Randall, took what virtually could be described as a
17 life savings from him as part of the distribution and
18 used all these people as he put them into places to
19 distribute.

20 When you look at the scope of the
21 supervision, I counted this morning about 11 people that
22 the jury found beyond a reasonable doubt that Ferris Lee
23 supervised during the course of this enterprise. That's
24 twice as many that we have to prove in the elements. As
25 the Court knows, we have to prove five. There were 11,

1 again including a juvenile. Significant and
2 sophisticated was this particular organization.

3 You look at the history and characteristics
4 of this defendant, he's a career offender, two prior
5 felony drug convictions, one a racketeering in Clay
6 County. And I think the Court noted this when analyzing
7 the 404(b) evidence at the trial. You know, one can
8 look at the crime of racketeering and then ascribe it a
9 very significant offense. And when you look at the
10 underlying charging documents I agree with the Court's
11 analysis that it was technically racketeering under
12 Minnesota law, but they were engaged in a similar
13 activity in the distribution of cocaine and crack
14 cocaine in the Clay County case.

15 What's significant about that offense,
16 Judge, is the defendant was convicted of racketeering,
17 served a relatively short sentence and does he change
18 direction in his life? No. Does he stop dealing
19 controlled substances? No. Does he stop dealing crack
20 cocaine? No. What does he do? He rises to the level
21 of the leader of an organization doing the same thing.

22 That's the significance of that conviction
23 when you analyze the history and characteristics of this
24 defendant particularly when the Court is fashioning a
25 sentence that is designed to promote respect for the

1 law. When somebody is convicted of a racketeering
2 offense, gets out after a relatively short sentence, the
3 next sentence should be designed to promote respect for
4 the law.

5 We look at deterrence, specific and general,
6 of course. This defendant has been previously convicted
7 on felony-level drug trafficking crimes on two
8 occasions. It's hard to see what the future might hold;
9 although, I note from the Presentence there was a fight
10 in the jail with Mr. Royston leading up to sentencing in
11 this case. So there is a need for specific deterrence.
12 And obviously with the leader of these organizations
13 general deterrence is of paramount importance in these
14 cases.

15 Finally, Judge, in analyzing a sentence that
16 is fair and just, we look at the issue of just
17 punishment. And here's where this sentence, and I think
18 the Court noted this at the outset, makes this
19 sentencing more difficult for all the parties, including
20 the Court, in fashioning a just sentence.

21 First I want to look outside the conspiracy
22 at other CCE defendants, and the only one that I could
23 find that was even similarly situated was Michael
24 Sanmiguel. Not a monstrous organization but significant
25 distributors, significant drugs amounts. This is a guy

1 who had a guideline range of 292 to 365 and then lost
2 acceptance because of the new crime and the Court
3 sentenced him to 360 months. Similar criminal history
4 absent a racketeering conviction.

5 Then you have within this particular
6 conspiracy Marcus Royston, who will -- later today based
7 on the minimum mandatory will likely receive a life
8 sentence based on the statute. Marcus Royston's role in
9 this particular offense was as a supervisor much less.
10 His culpability in our view, much less; albeit, he was a
11 source of supply for powder cocaine for a time frame.
12 At the end at least when narcotics agents are buying
13 drugs Marcus Royston's then working for Ferris Lee, and
14 so there's a switch in the structure which often happens
15 in these conspiracies. But the thing that remained
16 constant during the course of this whole conspiracy is
17 that Ferris Lee was the leader, period.

18 So we have the issue of unwarranted
19 sentencing disparity within this conspiracy case. So
20 how does the Court fashion a sentence to meet the goals
21 of this particular statute and fashion a sentence that
22 is just? Judge, the guideline range that the Court has
23 articulated and that Congress has indicated is 360 to
24 life. That meaning a sentence anywhere between 360 to
25 life is an appropriate sentence for this particular

1 offense.

2 Your Honor, it is our recommendation here
3 today that you sentence Mr. Lee to life in prison for
4 his role in this particular case and the factors under
5 3553(a) that we have articulated. We believe it's a
6 fair and just punishment for this particular conduct.
7 Thank you.

8 THE COURT: Mr. Goff?

9 MR. GOFF: Thank you, Your Honor. At the
10 outset let me state where I think Mr. Myers and I agree,
11 and that is that I recommend also the Court sentence my
12 client on the continuing criminal enterprise, Count
13 Fourteen, and vacate Count One, the conspiracy. From
14 there I don't think we'll agree on much.

15 This is described by counsel as the largest
16 and most sophisticated crack cocaine conspiracy or
17 enterprise that he has seen here. One thing I'd like to
18 draw the Court's attention to is the actual quantity of
19 substance that was ever seized in this investigation and
20 acknowledged at the trial in this case. I didn't bring
21 my notes with the exact amount but it was not a large --
22 we're talking around 20 grams or something of actual
23 substance that they seized.

24 Now I recognize the testimonial evidence and
25 the witnesses and the trips to Chicago back and forth,

1 various people. I recognize all that in term of the
2 evidence supporting the verdicts, Your Honor, but I
3 really would be reluctant and reticent to acknowledge or
4 agree that this was one of the most significant or
5 sophisticated organizations that this district has seen.

6 To say that my client used people, you know,
7 the people that were involved in this organization, the
8 people that were involved in this activity, had to make
9 choices on their own. My client, as the evidence
10 presented, was a person who was involved in various
11 locations: the Fargo, Bismarck, Sioux Falls, South
12 Dakota locations. No question that acknowledging the
13 facts in support of the convictions, but the people that
14 were involved in this thing, Your Honor, they made
15 choices of their own. They got involved in these
16 matters on their own. Those that used crack cocaine
17 made that choice on their own. That has to stand for
18 something. My client didn't hold a handle over
19 anybody's head. There's no indication, no allegation,
20 no claim of violence on his part in anything having to
21 do with the evidence in this case at all.

22 He has a history of criminal activity.
23 That's obvious. And it's been in a relatively short
24 period of time, as he's only about 26 years old, Your
25 Honor, much of it dealing with crack cocaine, cocaine

1 base. And he needs to be deterred from that. I will
2 acknowledge that and agree with Mr. Myers about that.
3 But what is enough?

4 I appreciate the recognition that the CCE
5 charge is the appropriate one to ask the Court to
6 sentence him on which, as we've discussed at length, the
7 Court has already today, that that leaves the guideline
8 range of 360 months to life. What's the right amount?
9 I would submit to the Court that there should be some
10 light at the end of that tunnel for a man that's 26
11 years old who needs to be -- needs to revisit the
12 decisions that he's made in his life. But there's no
13 reason to believe that he can't at some point recognize
14 that, accept that, take responsibility for that and
15 change any future behavior and conduct. He has a good
16 support system. Why that hasn't been enough in the past
17 I don't know. None of us can know. But they're here
18 again today trying to do what they can to support him.

19 Specific deterrence? Yeah, I guess that's
20 what I've addressed. General deterrence? It's very,
21 very important. But when is 30 years not enough general
22 deterrence? Not very often in my opinion that it's not
23 enough general deterrence. Is it 30 years? Is it 40
24 years? I would ask the Court to consider that 360-month
25 sentence for him on Count Fourteen and the other Counts

1 Two through Twelve would follow suit. I'd ask the Court
2 to impose those concurrently. It gives my client an
3 opportunity to enter whatever facility he finds himself
4 in with the recognition that if I behave, if I learn, if
5 I change, I can see something down the road where I can
6 have a life, something near my age I suppose when he
7 gets out if the Court were to accept that type of a
8 sentence. I just think that's enough, Your Honor. I
9 recognize all of the evidence in this case. I recognize
10 all of the people that have been affected here. But
11 that's a long time and not just a long time, I think
12 it's enough.

13 The disparity between he and Mr. Royston,
14 you know, the government probably had a choice in
15 indicting for both conspiracy and CCE, but we're left
16 with that situation. Mr. Royston, I think, has to take
17 responsibility and the consequences for his actions, for
18 his involvement. Whether it changed to become a
19 supervisor and then working underneath somebody else, I
20 can't change that. I can't fix that. We're only
21 dealing here with Mr. Ferris Lee, his life, the facts of
22 this case and the offenses and sentencing alternatives
23 that this Court has. I'd ask the Court to sentence him
24 to 360 months.

25 THE COURT: Mr. Myers?

1 MR. MYERS: Just briefly, Judge. I want to
2 highlight the comments on the drug quantity. I think as
3 articulated in the Presentence Report there was around
4 718 grams of crack cocaine. That's an enormous amount
5 of crack cocaine. When you even look at the new
6 calculations under the Fair Sentencing Act, that's two
7 and a half times the 10-year minimum threshold level.
8 That's an enormous amount of crack cocaine when you
9 consider the dosage units, the small quantities that
10 crack cocaine is sold in. That's the business, selling
11 as small a rock as you can for the greatest amount of
12 profit. And so that's a large amount of crack cocaine.

13 Secondly, Mr. Goff is right. The people
14 that entered into this conspiracy all made choices. But
15 when you talk about a leader and qualities of a good
16 leader, whether it be for bad purposes or good purposes,
17 that leader is successful when they persuade people to
18 make decisions in furtherance of the goal of that
19 organization or team or what have you. And that's what
20 Ferris Lee did. That's what he did. And that's what
21 he's getting punished for relating to the CCE.

22 And it is an irony in this case that had he
23 been just convicted of the conspiracy he would have
24 gotten a mandatory life. And, true, we did have a
25 choice to charge this case out and we did charge it the

1 appropriate way, charging Mr. Lee with the most serious
2 offense based upon his conduct.

3 That being said, guidelines and the law
4 allow this Court to sentence him up to life in prison
5 and that's what we're asking. Thank you.

6 THE COURT: Mr. Goff, anything further from
7 you?

8 MR. GOFF: I don't, Your Honor, but I know
9 my client wants to address the Court.

10 THE COURT: Mr. Lee, you have the right to
11 address the Court. Anything you say I will consider in
12 sentencing.

13 THE DEFENDANT: Okay. Well, he was talking
14 about a large-scale drug organization. For them to be
15 saying they investigated -- had me under investigation
16 for two years and really to my recollection in the
17 Indictment there was, what, 13 grams of controlled
18 substance sales. When the laboratory people came in
19 here they said that it would have been much lesser
20 because it was a mixture or some of the drugs were fake.
21 I don't know if -- like, what large-scale drug
22 organization sells fake drugs or things like that? And
23 the people that, like, testified to these drugs, these
24 were people that was trying to get themselves out of
25 situations and lying.

1 Now from trial statements Jake Northern
2 specifically told the Court that he was the president
3 and Tara Bauer was the vice-president. So if a man
4 admits himself that he was the president, where does
5 that put me at? I think the only reason why I was
6 charged with continuing criminal enterprise was because
7 Jake Northern decided to cooperate with law enforcement.

8 Now this whole point about he's saying that
9 I used people and I used force or whatever, first of
10 all, it ain't nothing proven that these people said that
11 they worked for me. Who actually got on the stand and
12 said that they worked for me? I was in trial. I didn't
13 hear none of that.

14 The second part is he said that on the CCE
15 he said I received -- I guess received most of the
16 profits. There wasn't a dollar in the evidence box
17 through this whole trial. I don't have no house. I
18 don't have no car. I don't have nothing. So where am I
19 getting all -- where was all this money at that I
20 supposedly got from this so-called organization?

21 Another thing, he's saying Lloyd Johnson was
22 a minor. I got acquitted on that so how can we use that
23 to -- as an aggravating factor? What else was I going
24 to say? That's really all. I'm just -- it's just -- I
25 don't see like where there was no evidence to prove that

1 I was a CCE leader of the organization and he's saying
2 that I used people and all these people worked for me.
3 I don't see how it was proven that these people worked
4 for me. And he said it was 718 grams at trial. Like my
5 lawyer said, it was only 13. Then they added another 11
6 grams from somebody that they say that the CI said that
7 the person that he got the drugs from said that he got
8 them from me. Now if that person would have said that
9 he got the drugs from me, I'm quite sure that they would
10 have had him testify in trial to that.

11 Now the person -- Cavelle Smallwood, he said
12 he knew me but he said he met me and I was incarcerated.
13 When he said he met me I was incarcerated so I don't see
14 how that could hold any weight. The rest of the grams
15 that he calculated was all hearsay. It wasn't like
16 no -- like I could see, okay, they caught somebody with
17 four ounces or even two ounces. Okay, that's probable
18 cause to say, okay, maybe then they can get 718 grams.
19 You caught somebody altogether in the conspiracy, well
20 you didn't catch nobody. You conduct controlled buys
21 for 18 grand. For a big-scale organization that's all
22 you could do is 13 grams and you been watching them for
23 two years? That's a waste of the taxpayers' money. You
24 scheduling buys for -- you paying \$1,800 for a buy and
25 you get one gram, 1.3 grams and you trying to say these

1 people was big organized drug crimes? I mean, I see on
2 the news every day big organized drug crimes that get
3 caught with 20,000, 20 bricks of cocaine, hundred
4 thousands of dollars, cribs everywhere, cars. I don't
5 have none of that, none of that, Your Honor. It just --
6 it don't make no sense to me.

7 THE COURT: The Court has considered the
8 sentencing statute, including the mandatory minimum
9 sentences that apply. The Court is required by law to
10 impose a sentence not greater than necessary but
11 sufficient to comply with the purposes set forth in the
12 statute, which is found at 18, United States Code,
13 Section 3553.

14 We turn first to the nature and
15 circumstances of the offense. I would agree with the
16 government's characterization that this is a relatively
17 sophisticated operation that takes place over a period
18 of time and takes place over a rather large geographic
19 sweep. There's evidence that activity was conducted in
20 Minnesota, North Dakota, South Dakota and ties into
21 Illinois. The organization existed for a period of some
22 time, and there were repeated crimes committed during
23 the time that the organization was in existence. It's a
24 significant drug conspiracy in both its scope and its
25 length.

1 We look to the history and characteristics
2 of the defendant. The defendant has obviously a
3 significant criminal history. He is a career offender,
4 which obviously is something this Court takes into
5 consideration. I am particularly troubled with the fact
6 that the defendant had a conviction previously for
7 racketeering and within a relatively short period of
8 time following his release he was engaged in exactly the
9 same activities and conduct. And that's a factor that
10 the Court takes into consideration.

11 The sentence needs to reflect the
12 seriousness of the offense, promote respect for the law
13 and provide just punishment. Any of the sentences that
14 we're talking about here would reflect that this is a
15 serious drug crime and they would promote respect for
16 the law and provide just punishment.

17 We want to afford adequate deterrence to
18 criminal conduct. That's specific deterrence. You
19 know, this defendant's past would indicate that he's had
20 some difficulty living a law-abiding lifestyle. It
21 seems to me that he has not learned very quickly from
22 his previous mistakes. I believe that he does pose a
23 continuing risk to the -- to criminal conduct.

24 When we look at the next, which is general
25 deterrence, providing adequate deterrence to criminal

1 conduct generally, the important thing in the continuing
2 criminal enterprise convictions is that the sentences be
3 imposed to deter others from really engaging in sort of
4 sophisticated criminal behavior involving the management
5 of more people. And I think that that's a factor the
6 Court needs to take into consideration.

7 Providing the defendant with needed
8 educational, vocational training, medical care or other
9 correctional treatment, doesn't appear to be a lot of
10 basis for that in this particular sentence.

11 When we turn to the kinds of punishments
12 available, we look to the statutes relating to
13 sentencing. This is a presumptive imprisonment case and
14 Congress of the United States has elected to impose
15 mandatory minimums that are significant in a number of
16 the counts with a mandatory life sentence on Count One.

17 It is, therefore, the order of the Court on
18 Count One that the defendant be committed to the care,
19 custody and control of the United States Department of
20 Justice for a period of life; that following that life
21 sentence he be placed on supervised release for a period
22 of five years on the standard terms and conditions. And
23 there will be additional terms and conditions that will
24 apply:

25 One, that the defendant totally abstain from

1 the use of alcohol and/or illegal drugs or the
2 possession of a controlled substance as defined in 21,
3 United States Code, Section 802 or any state statute,
4 unless it's prescribed by a licensed medical
5 practitioner as well as prohibition of the use of
6 inhalants. The defendant shall submit to drug and
7 alcohol screening at the direction of the probation
8 officer to verify compliance. Failure or refusal to
9 submit to testing can result in a mandatory revocation.
10 Tampering with the collection process or specimen may be
11 considered the same as a positive test result.

12 Three, the defendant will participate in a
13 treatment program for alcohol and drug abuse as provided
14 by his -- as approved by his supervising officer.

15 Four, the defendant shall submit his person,
16 residence, workplace, vehicle, computer and/or
17 possessions to a search conducted by the United States
18 probation officer based upon evidence of a violation of
19 any condition of supervision. Failure to submit to
20 search may be grounds for revocation, additional
21 criminal charges and arrest. The defendant shall notify
22 any other residents that the premises may be subject to
23 searches pursuant to this condition.

24 There is no identifiable victim requiring
25 restitution. The mandatory drug testing provisions of

1 18, United States Code, Section 3563(a)(5) apply and the
2 defendant's placed on notice of the same.

3 The Court will not order a denial of federal
4 benefits in the case. The special assessment of \$100 is
5 due and payable immediately through the clerk of
6 district court.

7 The DNA Analysis Backlog Elimination Act of
8 2000 and the Justice for All Act of 2004 require the
9 defendant to submit to a DNA specimen as directed by his
10 supervising officer. The Court will order him to
11 cooperate in the collection of that specimen.

12 On Counts Two, Seven and Nine, the Court
13 imposes a sentence of 46 months to run concurrent with
14 each other and to run concurrent with the life sentence,
15 followed by five years of supervised release on the same
16 terms and conditions as were previously stated.

17 On Counts Three, Five, Seven and Eleven, the
18 defendant is ordered to serve in the care, custody and
19 control of the United States Department of Justice 70
20 months to run concurrent with all other counts; five
21 years of supervised release on the same terms and
22 conditions.

23 On Counts Eight and Twelve, the Court orders
24 the defendant to serve 57 months concurrent, five years'
25 supervised release on the same terms and conditions.

1 On Count Ten the Court orders the defendant
2 to serve 84 months concurrent with five years of
3 supervised release on the same conditions.

4 And that leads us to Count Fourteen. There
5 are a couple of items that I would note for this
6 particular count. The Court is concerned about
7 sentencing disparity that would arise from a sentence of
8 less than life on Count Fourteen as it appears that this
9 defendant is more culpable than Mr. Royston, and it does
10 appear to be that way from all the evidence. And
11 ordinarily at that point I really would just impose a
12 life sentence and never look back.

13 But I have some concerns because I don't
14 have a crystal ball and I don't know what's going to
15 happen out in the future. I do know that we are in a
16 period of time where we have a large number of people
17 incarcerated and the population in prison is growing.
18 And I suspect that at some point either an expansion of
19 the president's commutation powers or exercise of his
20 commutation powers to reduce people to sentences of time
21 served or a reinstatement of some parole system is
22 likely.

23 I also am concerned that in the final
24 analysis if that happens it's unlikely that continuing
25 criminal enterprise convictions would be included in any

1 systematic review of sentences. And I don't think that
2 the defendant's conduct is so different than
3 Mr. Royston's conduct that that opportunity ought to be
4 foreclosed. And, like I said, I don't have a crystal
5 ball. I don't know what the right answer is.

6 At the end it strikes me that we can only do
7 justice in one case one at a time and, frankly, if you
8 look at people who have served life sentences out of
9 this Court generally the drug quantities have been
10 larger and generally the -- there's been greater risk of
11 violence than what appeared to exist in this case.

12 Under those circumstances it's the order of
13 the Court, on Count Fourteen, that the defendant be
14 committed to the care, custody and control of the United
15 States Department of Justice for a period of 540 months,
16 that following that sentence he be placed on supervised
17 release for a period of five years on the same terms and
18 conditions, which means that the defendant will be
19 eligible for release if he stays out of trouble while in
20 custody sometime in his mid '60s.

21 You have the right to appeal the judgment of
22 this Court. Any appeal -- oh, by the way, the total
23 amount of the special assessment will be \$1,200. The
24 Court will order the vacation of the sentence on
25 Count One and do so on the basis of double jeopardy

1 grounds, that the lesser included offense should be
2 removed.

3 MR. MYERS: Just a clerical correction,
4 Judge. I think the Court said, when you talked about
5 Counts Three, Five and Eleven, a 70-month sentence. I
6 think the Court said Count Seven again.

7 THE COURT: Oh, did I say seven twice? I
8 shouldn't have.

9 MR. GOFF: Yes.

10 THE COURT: Sorry. The second time was in
11 error.

12 MR. MYERS: Is that referring to Counts,
13 Three, Five, Six and Eleven?

14 THE COURT: Yeah. Let me take a look just
15 to make sure. It's Three, Five, Six and Eleven are 70
16 months. And Two, Four, Seven are 46 months. And Eight
17 and Twelve are 57 months. And Ten is 84 months. And
18 540 months on Count Fourteen, all sentences to run
19 concurrent with each other.

20 MR. GOFF: Is there a Nine in there?

21 THE COURT: Did I miss Nine? Nine is 46
22 months so that should be with Two, Four, Seven and Nine.

23 MR. GOFF: Okay. Your Honor, just if I
24 might add, as far as the appeal, my client and I have
25 discussed that and I will be filing a Notice of Appeal

1 on his behalf in the next several days. He and I have
2 discussed the Fair Sentencing Act recently enacted by
3 Congress and signed by the president, and we discussed
4 the applicability. It hasn't been raised here today but
5 I think it's not applicable. It's not retroactive and I
6 just want to make sure that the record is clear.

7 THE COURT: Right. I addressed that in my
8 opinion briefly. I don't know if I did it in just
9 Mr. Forest's case or all of them. The reality of it is
10 that specifically the act provides that it's not
11 retroactive. The guidelines may in fact provide for it
12 to be retroactive. We won't know that until the
13 guideline amendments come out in November, but they
14 can't affect any mandatory minimum sentence and so
15 that's what we know. At this point I've imposed the
16 sentence based on what law's applicable here today.

17 MR. GOFF: And one final item before I
18 forget. If possible, my client would like a
19 recommendation that he be housed somewhere as close as
20 possible to his family in the Chicago, Illinois area.

21 THE COURT: The Court will make that as its
22 first recommendation. The second recommendation is that
23 he be allowed to participate in the RDAP program and if
24 there's any benefit to inure through successful
25 completion of the program that he afforded that

1 opportunity.

2 Like I said, you have 10 days to appeal the
3 verdict of this Court -- or the judgment of this Court.
4 Any appeal, if taken, must be perfected as provided by
5 law. Your lawyer can explain to you what you need to do
6 to do that.

7 Anything further from the United States?

8 MR. MYERS: No, Your Honor.

9 THE COURT: From the defense?

10 MR. GOFF: We probably don't need to mention
11 it, but he'll get credit for time served as well?

12 THE COURT: Yes.

13 MR. GOFF: Okay. Thank you. That's all I
14 have.

15 (Concluded at 12:20 p.m.)
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CERTIFICATE OF REPORTER

I, Kelly A. Kroke, a duly appointed
Registered Professional Reporter;

DO HEREBY CERTIFY that I reported in
shorthand the foregoing proceedings had and made a
record at the time and place indicated.

I DO HEREBY FURTHER CERTIFY that the
foregoing and attached (46) typewritten pages contain an
accurate transcript of my shorthand notes then and there
taken.

Dated this 16th day of January, 2011.

/s/ Kelly A. Kroke
KELLY A. KROKE - RPR, RMR
United States District Court Reporter
District of North Dakota
Southeastern Division